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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 26

UNITED STATES OF AMERICA, PETITIONER

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 25-26) is reported *sub nom. United States* v. *Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 31-41) are reported at 170 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1948 (R. 41). The petition for a writ of certiorari was filed on February 18, 1949, and was granted on April 18, 1949 (R.

43). The jurisdiction of this Court rests on 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether, when the United States condemns the use of leased property for an initial period less than the remainder of the lessee's term but with options in the Government to extend, and these options are exercised so as to extend the Government occupancy beyond the lessee's term, there is a taking of the entire lease and consequently no liability to make compensation on account of the lessee's expenses in moving personal property from the premises.

STATEMENT

The United States instituted this proceeding on February 18, 1943, by filing its petition to condemn property in Springfield, Massachusetts, for war purposes. The interest taken was described as "a term for years ending June 30, 1943 * * * said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof;" (R. 2). Immediate possession was granted on the same day (R. 4-5) and on May 1, 1943, notice of election to extend the term to June 30, 1944, was filed (R. 11-12). On May 25, 1944, a similar notice was given extending the term to June 30,

1945 (R. 15). On April 16, 1943, a declaration of taking was filed, and estimated compensation of $19,192.43 for the original term was deposited in court (R. 5-8). In 1943 and 1944 supplemental deposits were made, the compensation for each yearly extension being estimated at $51,195.60 (R. 20).

At the time the proceedings were instituted, the Hodges Carpet Company was the owner of the property. The Westinghouse Electric Company occupied a portion of the premises under a lease dated January 19, 1942, for a term expiring October 30, 1944.

All parties joined in a stipulation of the facts filed May 27, 1947. In addition to the facts already stated, it was agreed as follows (R. 20-22):

In compliance with the order of immediate possession Westinghouse removed from the premises, incurring costs and expenses of $25,600 in moving personal property. If trial had been held upon its claim, witnesses would have testified that $25,600.00 had been expended in moving the personal property, that this was necessary and a fair and reasonable expenditure, and that the market rental value of the portion of the premises occupied by Westinghouse on a sub-lease given by it as long term tenant to a temporary occupier was $25,600 above the rent reserved, i.e., the removal cost. The admissibility of such evidence was reserved for determination by the court. Westinghouse waived any claim other than its demand for $25,600, and it was

stipulated that the deposits previously made, which totalled $121,045.78, represented the fair market rental value of the bare unheated warehouse space taken. The parties agreed that, if Westinghouse was entitled to recover the $25,600.00, judgment should be entered against the United States for $146,645.78 inclusive of interest, of which $25,600 should be distributed to Westinghouse and the remaining $121,045.78 to Hodges Carpet Company. If Westinghouse's claim was rejected, then judgment should be entered for $121,045.78 which should be distributed to Hodges Carpet Company. The legal issue as to whether the $25,600 was recoverable by Westinghouse was submitted to the court.

The district court, in an opinion entered June 12, 1947, concluded that Westinghouse was entitled to recover (R. 25-26), and an appropriate judgment was entered on November 24, 1947 (R. 26-28). The Court of Appeals affirmed, Chief Judge Magruder dissenting (R. 31-41). The district judge and the majority of the Court of Appeals thought that the rule laid down in this Court's decision in *United States* v. *General Motors Corp.*, 323 U.S. 373, was controlling. Chief Judge Magruder, however, took the view that this case was governed by the decision in *United States* v. *Petty Motor Co.*, 327 U.S. 372.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent's expenses of removal from the premises, on which its lease ex-

pired on October 30, 1944, could be considered in determining just compensation to respondent for the taking of its leasehold, where the taking was for a term ending June 30, 1943, and also provided for additional yearly periods during the national emergency at the Government's option, and these options were actually exercised so as to extend the Government's term to June 30, 1945.

2. In holding that in these circumstances respondent was entitled to an award based on the costs of removing its personal property from the location in question to a new location.

3. In affirming the district court's entry of judgment in favor of respondent.

SUMMARY OF ARGUMENT

The sole question here is whether evidence of the expenses incurred by Westinghouse in moving from the premises was admissible, it being agreed that absent that element the rental value of the portion of the premises occupied by Westinghouse did not exceed the amount payable under its lease.

Evidence of that character is not ordinarily admissible either when the Government takes fee title or where it takes temporary occupancy for a period longer than that of existing leases. In the latter case, such taking merely accelerates the lessee's term, and his removal costs are incurred sooner by reason of the taking. They would have been incurred in any event, regardless of the taking, and are not compensable. The only exception to this

rule is represented by *United States* v. *General Motors Corp.*, 323 U.S. 373, permitting consideration of the tenant's removal costs where the taking was shorter than the remaining lease term. That exception has no application to the instant case.

A. This Court's decisions in *United States* v. *Petty Motor Co.*, 327 U.S. 372, and *Kimball Laundry Company* v. *United States*, 338 U. S. 1, made it clear that the exceptional rule of the *General Motors* case was based upon the fact that, after the Government vacated the premises, the lessee was obliged to return thereto or at least was obligated for the remainder of the lease term. Westinghouse, which had the burden of proving the facts establishing its right to compensation, did not and could not establish the existence of any such obligation, since its lease expired in October 1944, and Government occupancy continued until June 30, 1945. Since Westinghouse was not subjected to any greater expense than it would have had to bear upon expiration of its lease by lapse of time, the exceptional rule of the *General Motors* case does not apply.

B. Factually, there is no substantial difference between this case and the *Petty Motor* case, where the interest taken was described as a term for three years which could be cut short at the end of one or two years. The difference between such an interest and a short term subject to extension upon the Government's option, the type of taking described in the instant case, is purely formal and does not lead

to application of a different measure of compensation. And even if there were a distinction between the two forms of taking, the difference would be irrelevant here, since respondent's term admittedly expired before the end of the Government's use, and it was not obliged to return to the premises and suffered no actual loss or dislocation because of an obligation for a remainder of its lease.

C. Respondent is not being deprived of a vested right to have moving costs considered, which came into being on the date of taking. While the right to compensation vested at the date of taking, the applicability of the *General Motors* case, and hence, the admissibility of evidence to measure compensation, necessarily depended upon events which might occur later. The cases in the field of eminent domain valuation, as well as in other areas of the law of valuation and damages, make it plain that there is no rule prohibiting courts from looking to events occurring after the date of taking in order to ascertain the true facts. Respondent has no cause to complain that the facts known to exist at the time of trial are considered. Although no such question is presented by this case, since the trial took place after it was known that respondent's entire lease interest had been taken, no reason appears why trial could not be postponed if, at the time the case would otherwise be reached for trial, it is not known whether the tenant will be obligated to return to the premises when the Government vacates. Removal costs may be considered only if that obligation exists.

ARGUMENT

Respondent Is Not Entitled to an Award for Its Condemned Leasehold Based Upon a Consideration of Its Removal Expenses

In the stipulation, respondent waived any claim except for $25,600, and agreed that if evidence of expenses of removing its personal property from the premises was not admissible, the entire award should be paid to the fee owner (R. 20-21). It is not contended, for instance, that the current rental value of the warehouse space Westinghouse occupied exceeded the amount of rent due under its lease for such space, nor is any claim made that Westinghouse was entitled to recover such rental value and in turn pay it over to the fee owner. Cf. *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (C. A. 1). It is further stipulated that witnesses for Westinghouse would have testified that the market rental value of its space "on a sublease which would be given by it as long-term tenant to a temporary occupier over and above the rent reserved under its lease, was the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier", and that if Westinghouse's evidence were admissible, the $25,600.00 should be included in the total compensation owing by the Government (R. 21). Thus, the sole question is whether evidence of cost of removal was admissible in the determination of just compensation for the taking of the leasehold.

It is well-settled that such evidence is not ordinarily admissible in eminent domain cases. As this Court said in *United States* v. *General Motors Corp.*, 323 U.S. 373, 379:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, *the expense of moving removable fixtures and personal property from the premises,* the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound (Italics supplied).

The same rule applies when, in the case of condemnation of temporary occupancy rather than fee title, the occupancy taken by the United States extends beyond the term of existing leaseholds. In *United States* v. *Petty Motor Co.*, 327 U.S. 372, this Court said (p. 378):

> We think the sounder rule under the federal statutes is to treat the condemnation of all in-

terests in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted.

The *General Motors* case—permitting consideration of the lessee's removal costs where the Government did not take the lessee's entire term—represents the only exception to this well-settled rule. We think it clear that that exception has no application to the present case.

A. *Since respondent's entire term was ultimately taken pursuant to the condemnation petition, the exceptional rule of the General Motors decision, which rests on the fact of a partial taking, does not apply here.*—The *General Motors* decision held that evidence of the lessee's removal expenses was admissible in a case where the Government's temporary taking was of shorter duration than the term of the existing lease. As that case was decided in this Court, it involved a one-year taking, in 1942, of warehouse space on which the General Motors Corporation held a twenty-year lease (1928-1948) with six years left to run. 323 U. S. at 375. At the end of the Government's year of occupancy, the company would again be responsible for the premises, and would either have to resume use of the warehouse by returning its property or equipment, make some other useful disposition of the space, or suffer the loss of the annual rentals it would continue to be obligated to pay to the owner. It was in these circumstances that the Court permitted the

tenant to prove its removal costs as an aid to the determination of the just compensation to be awarded it for the "chopping up" of its interest, taking only a part and leaving it holding the remainder, "which may then be altogether useless to [it]," 323 U. S. at 382-383. The reason for this exception was explained in the *Petty Motor* decision as follows (pp. 379-380):

> There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

More recently, in *Kimball Laundry Company* v. *United States*, 338 U. S. 1, it was stated—in reference to the difference in the lessee's obligation at the end of the Government's occupation—that the line between the two cases "is likewise based on a recognition of a difference in the degree of restriction of the condemnee's opportunity to adjust himself to the taking."

Since the burden of establishing a right to compensation rests upon the condemnee (*United States*

ex rel. T. V. A. v. *Powelson*, 319 U. S. 266; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 631; *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (C.A. 1); *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 398 (C.A. 2)), it was incumbent upon respondent to show that its claim came within the *General Motors* exception to the rule excluding consideration of removal costs, by proving that it was obligated to return to the leased premises at the end of the Government's use, or that responsibility for any period of the lease not taken rested upon it. No such showing was attempted, and respondent made no claim to be compensated for the rent reserved. And, in fact, it was clear at the time of trial (May 1947) that the period of respondent's lease had terminated (on October 30, 1944) during the Government's occupancy, so that respondent could neither be compelled to resume any obligations, nor choose to avail itself of privileges, under the lease.

In the *Petty Motor* decision, this Court held that when all of the interest of a lessee is taken the rule applicable when the fee is condemned applies, stating (pp. 378-379): "The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of the leasehold covers the loss from the premature termination except in the unusual situation where there is a higher cost for present relocation than for a fu-

ture."[1] Respondent is in precisely the same situation. Its removal from the premises was simply accelerated some twenty months.[2] Respondent made no attempt to show that its expenses of removal were any greater than they would have been at the time the lease expired (see R. 20-22). It follows that evidence of removal costs was not admissible here.

B. *Application of the exceptional rule of the General Motors case depends not upon the form of words used by the Government in taking the lessee's interest but on the substance of the taking.* —The majority opinion of the court below recognized that the *General Motors* decision was based primarily, if not entirely, on the fact that the tenant was under an obligation to return to the premises after termination of the Government's use (R. 34). It did not conclude that Westinghouse was under any such obligation. Nevertheless, it held that this case was controlled by the *General Motors* decision, recognizing that its conclusion rested simply on the form of words used by the

[1] This ruling was foreshadowed in the *General Motors* opinion, in which the Court pointed out that consequential damages, including removal costs, are not payable when the Government "takes the property, that is, the fee, the *lease*, whatever he may own, *terminating altogether his interest* . . ." 323 U. S. at 382 (italics supplied).

[2] Respondent's lease did not give it any option to renew its tenancy (R. 22-25), and the *Petty Motor* case explicitly holds that the possibility of renewal by mutual agreement does not add anything to the tenant's rights or permit it to prove costs of moving or relocation which would otherwise be inadmissible. 327 U. S., at 380.

Government in taking the property, and that "the way is now open for the Government to avoid any possibility of liability for removal costs by the simple expedient of 'chopping up' the tenant's interest as it did in the *Petty Motor* case rather than as it did in the *General Motors* case" (R. 37-38). We submit, however, that the significant difference between the rules of the two cases does not rest simply upon the form of words that the Government officer might employ, but rather upon the fact whether the tenant was actually obligated under his lease to return to the premises at the end of the Government's occupancy. Cf. *Helvering* v. *Hallock*, 309 U. S. 106.

1. The majority of the Court of Appeals thought that the *General Motors* rule governs here because, after the just compensation judgment had been originally entered in that case, the District Court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to include a right of indefinite yearly renewals at the election of the Secretary of War. 323 U. S. at 376, fn. 3. In the *Petty* case, on the other hand, the Government took the building for use from November 1942 through June 30, 1945, with the right of election in the United States to surrender the premises on June 30, 1943, or June 30, 1944, upon sixty days' written notice to the owner. 327 U. S. at 374. It is this formal distinction in the terms of taking, rather than the events

which actually occurred, which the Court of Appeals stresses.

But it is quite clear that the *General Motors* opinion dealt only with the initial taking for one year, and did not consider the added renewal option, or purport to lay down any rule as to the admissibility of removal expenses where a renewal option has been exercised so as to extend the Government's occupancy beyond the term of the condemnee-tenant's lease. After briefly adverting to the post-judgment amendment of the condemnation petition to include the option, Mr. Justice Roberts stated for the Court:

> We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year [323 U. S. at 377, fn. 3].[3]

In the *Petty Motor* opinion it was also pointed out (fn. 3, 327 U. S., at 375) that the *General Motors* case, in this Court, involved simply the original taking for one year. Indeed, there was no showing in the earlier case that the Government had ever exercised its option. Cf. Mr. Justice Rutledge, concurring in the *Petty* case, 327 U.S. at 383, and Magruder, C. J., dissenting below, R.

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[3] The Court of Appeals, in the *General Motors* case, which took the same view as this Court, said as to the addition of the renewal option: "We do not understand, however, that this amended petition has any bearing upon the issues before the court below or here." 140 F. 2d 873, at 874, fn. 1.

40.[4] It is thus plain that the *General Motors* decision did not hold that if the Government's occupancy were extended beyond the term of the lease the exceptional rule permitting introduction of evidence of removal expenses would nevertheless apply.[5] And the later *Petty Motor* decision made it clear that the exceptional rule is inapplicable when the tenant is not obligated to return to the premises after the Government's occupancy terminates. *Supra*, pp. 10-13; *infra*, pp. 17-18.

2. Respondent seeks to support the decision below on the ground that under the form of words used in the *Petty Motor* case the lessee is freed of all obligation to move back if there is an early termination of the Government's occupancy, while

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[4] The *General Motors* record (Oct. Term 1944, No. 76) does not indicate whether the Government's occupancy was actually extended or not. The briefs of the parties in this Court discuss the matter as if it involved only the original one-year taking.

[5] There is nothing to the contrary in the Court's statement that "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded." 323 U. S. at 377, fn. 3. The option, whether exercised or not, might have affected the value of the interest taken by the Government and that is all the Court appears to have meant. Moreover, this Court's decision was handed down on January 8, 1945, and by that date the extent to which the Government's occupancy had thus far been extended from June 30, 1943, would be known to the parties and additional amounts due because of renewals up to that time could be calculated on the remand. General Motors' lease did not expire until May 31, 1948—over three years after this Court's decision—and the Government would have had to exercise its option five successive times in order to extend its occupancy beyond the company's term.

this is not so when the form of taking is for one year with an option to renew (Br. in Opp., pp. 7-8).

a. Even if this were true, it would be irrelevant to the present case, since Westinghouse was not obliged to return to the premises and the Government's occupancy outlasted the term of the lease. By exercising its renewal options in accordance with the condemnation petition, the Government actually took the whole of respondent's lease and removed any duty to fulfill its provisions. Whatever the possibilities when the condemnation petition was first filed in February 1943, and whatever anticipation respondent may then have had that it would have to return, it was certain by May 25, 1944, that the lease would expire before the Government vacated the warehouse (R. 15). And respondent has not even attempted to prove that its removal costs were in any way affected or increased by the initial uncertainty as to its moving back.[6] As the Court has stressed, the fundamental basis for the *General Motors-Petty Motor* rule is that removal costs are allowable only where the re-

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[6] At the date of taking it was, of course, speculative whether the tenant would have to move back since that depended upon the Government's intentions. Respondent's assertion that while the possibility exists the tenant must seek a new location "mindful of the fact that he is obligated to return to the original premises" (Br. in Opp., p. 4), cannot justify the present judgment since the expenses of removal have no relation to the burden that the existence of this possibility might have thrust upon the tenant. Indeed, as we have said, there is nothing to indicate that the respondent's removal expenses were any greater than they would have been when its lease expired. See *infra*, pp. 23-24, 24-25; *supra*, p. 13.

moval is *temporary*, where the lessee *must* return to the leasehold at the end of the Government's use or at least bear the responsibility for the remainder of the lease term. 323 U. S. at 380, 382, 383; 327 U. S. at 378-380. The rule attempts to adjust to the realities of the tenant's situation and to compensate him for an actual lessening in value of his leasehold attributable to the Government's intervening temporary occupancy. There is no occasion to extend the rule to compensate a tenant whose leasehold might possibly have decreased in value but actually did not do so because the Government's occupancy was—so far as concerns the tenant—neither intervening nor temporary.

b. In any case, it is very doubtful whether respondent's asserted distinction in the effect of the two forms of taking is correct. In reason, it would appear that the result should be the same, whichever form is used to describe what is essentially the same interest. Both formulae make the limit and extent of Government occupancy determinable solely by the Government, and that furnishes very good ground for the view that their effect on existing landlord-tenant relationships is identical.[7] In

[7] Respondent phrases its distinction in terms of freeing the lessee, under the *Petty* formula, from the *obligation* of returning to the premises, but in some cases it may very well be that the tenant would desire to exercise the *privilege* of returning under the old lease terms. If the *Petty* form-of-taking frees the tenant from any further obligation to the leasehold, whatever the actual length of the Government's occupancy, it would probably likewise destroy any rights or privileges under the lease.

his concurring opinion in the *Petty* case (327 U. S. at 381-385), Mr. Justice Rutledge explicitly treated them as identical in effect; his separate expression of views in that case would have been totally unnecessary on respondent's theory.

It is not clear whether the effect of the condemnation of temporary use by the Federal Government upon an existing lease, especially in relation to the obligation of the tenant to return to the premises at the end of the taking, is to be determined by federal or state law.[8] However this may be, we know of only three cases directly bearing on this problem, and none of them throw much light on respondent's claim that the tenant's obligation to resume occupancy of the premises varies with the form of words used in the taking. In *Galvin* v. *Southern Hotel Corporation*, 154 F. 2d 970 (C. A. 4), and *Galvin* v. *Southern Hotel Corporation*, 164 F. 2d 791 (C. A. 4), the issues related solely to distribution of amounts which had been paid by the United States as just compensation for the temporary taking of hotel property and the United States was not concerned with the outcome of the dispute. The second of the cited

[8] The law relating to the rights and obligations of landlords and tenants is, of course, ordinarily determined by the law of the state where the property is located. Cf. *Petty*, 327 U. S. at 376, 381. But it is also well settled that matters which affect the measure of compensation payable by the United States are normally determined by federal law. *United States* v. *Miller*, 317 U. S. 369. Hence, federal principles override special state rules as to the compensation payable to lessees of state school lands. *Nebraska* v. *United States*, 164 F. 2d 866 (C.A. 8), certiorari denied, 334 U. S. 815.

cases held that rights of the lessee were forfeited for violations of its lease as of the date when the United States surrendered possession. In *Leonard* v. *Autocar Sales & Service Co.*, 392 Ill. 182, certiorari denied, 327 U. S. 804, the state court held that a lessee of property of which temporary occupancy was condemned by the United States was obligated to continue to pay rent to his lessor; state law was applied. These cases all involved instances where the description of the interest taken took the form of a term for a year with a right to renew, as in the instant case, but there is nothing in the reasoning of the opinions indicating that the result depended on the form of taking.[9] We doubt whether respondent's distinction exists, but, as we have pointed out, that issue need not be determined here, since the admissibility of evidence of moving costs rests on the fact whether the tenant is actually obligated to return to the premises, and Westinghouse plainly was not.

C. The rule that value of condemned property is to be determined as of the date of taking does not require consideration of respondent's removal.

[9] In the *Leonard* case the court declined to express an opinion as to the results that might follow if the Government extended its occupancy for the entire remaining term of the lease. 392 Ill. at 190. It should be noted that the *Leonard* case cannot aid Westinghouse for the further reason that it was there held that the tenant was obligated to continue to pay rent during the Government's occupancy while the stipulation in the instant case provides that the owner receives the entire rental value except the alleged increment represented by expenses of removal. See *supra*, pp. 3-4, 8.

expenses.—Respondent states that its right to just compensation arose on the date of taking and that "Just compensation is market value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking" (Br. in Opp., pp. 3-4). But here there is no question of attempting to deprive respondent of a right to compensation which has previously vested. The question is simply one of the evidence which is admissible to determine the amount of compensation. The admissibility of this evidence necessarily depends upon events that in the nature of things could only occur later. In other words, respondent was not vested at the date of taking with an irrevocable right to have moving costs considered, regardless of its actual situation, but rather it might introduce evidence of such costs if it appeared that the exceptional circumstances of the *General Motors* case were present. That prerequisite to admissibility could only be established by actual events which occurred subsequent to the initial taking but pursuant to its provisions. The original condemnation petition (R. 2-3) and declaration of taking (R. 5-6) sanctioned and provided for the renewal options which were later exercised so as to take respondent's entire interest. Thus, at the very outset, it was quite plain that the Government's occupancy might well outlast respondent's lease term, and that consideration of respondent's removal costs would depend, under

the *General Motors-Petty* rule, on the length of the Government's use of the premises.

There is certainly no absolute principle, in eminent domain proceedings, that courts should close their eyes to events occurring after the date of taking, in determining the value of the interest taken as of the time of taking. On the contrary, in *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, where it was held that the wartime temporary taking of the railroad was at most simply a technical taking which did not cause any loss and hence gave no right to recover substantial damages, this Court recognized that evidence of events after the taking could properly be considered. In rejecting a report of a statutory board of referees which had determined upon a substantial award, the Court said (270 U. S. at p. 286):

> No evidence was introduced before it to show that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value, although the hearing before the board was commenced long after the period of alleged possession and control had expired.

A similar contention—that facts occurring after the date of taking might not be considered in determining value as of that date—was rejected in *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 397 (C. A. 2), the court stating, "It would seem an eerie conclusion that a court must resort

to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available." See Orgel, *Valuation under Eminent Domain*, 1936, sec. 26, p. 88; II Bonbright, *Valuation of Property*, p. 1177; cf. *11,000 Acres of Land in Smith County, Texas* v. *United States*, 152 F. 2d 566 (C. A. 5), certiorari denied, 328 U. S. 835. As Mr. Justice Cardozo pointed out in *Sinclair Rfg. Co.* v. *Jenkins Co.*, 289 U.S. 689, 698, to correct prophecies which must necessarily be uncertain at the valuation-date in the light of later events is to "bring out and expose to light the elements of value that were there from the beginning", rather than to recognize later elements of value non-existent at the critical date. If respondent were to be rigorously governed by its own logic, it would be barred from claiming, as it has, that it actually expended $25,600 in moving (R. 20-21), since the removal occurred after the date of taking.[10] And more importantly, it would be required, on its theory, to evaluate the chance, as of the date of taking, of the Government's exercising the renewal options so as to take the entire term of the lease, before it could even begin to bear its burden of proving loss. If that chance appears great, the lessee's possibility of loss—evaluated prospectively from the date of taking—is obviously small, and at best it would be entitled

[10] In the *General Motors* case, the Court directed the receipt in evidence of "amounts actually and necessarily paid" by the tenant subsequent to the date of taking. 323 U. S. at 383.

to much less than its full removal costs. See also *infra*, pp. 24-25.

Elsewhere in the law of valuation and damages, "experience is [made] available to correct uncertain prophecy" (289 U. S. at 698). Later actual use of a patented device is a legitimate aid to the appraisal of its value at the time of breach of a contract to assign the application for the patent: *Sinclair Rfg. Co.* v. *Jenkins Co.*, 289 U. S. 689, 697-698. In the normal personal injury or breach of contract case, evidence of the actual facts as to damage up to the time of trial is admissible. *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 397-398 (C. A. 2); *Sinclair Rfg. Co.* v. *Jenkins Co.*, *supra*, p. 698; McCormick, *Damages*, pp. 299, 303, 323. There is no reason why condemnation cases must be subject to any more uncertain and speculative proof of value.[11]

Any suggestion that evidence of removal expenses is admissible, under the *General Motors-Petty* rule, whenever there is a possibility at the date of taking that the tenant may be required to return to the premises after Government occu-

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[11] As explained in the *Sinclair Rfg. Co.* case, at 698, *Ithaca Trust Co.* v. *United States*, 279 U. S. 151—holding the value of a life estate to be determined for purposes of the estate tax on the basis of life expectancy at the time of the decedent's death even though the life tenant died before computation and return of the tax—is based on the special intention of Congress "that the computation of the tax should be made as of the death of the testator on the basis of a law of averages." Moreover, valuations for tax purposes present administrative and other problems not present in eminent domain matters. Cf. *Henslee* v. *Union Planters Bank*, 335 U. S. 595.

pancy—no matter how remote that possibility may be under the circumstances of the case—runs counter to the basic rationale of both cases, which emphasizes the tenant's real loss and dislocation. *Supra*, pp. 10-13, 14-16, 17-18. And even on the view that nothing occurring after the taking date can be considered, removal expenses would hardly be a fair or proper measure of the *possibility* that the tenant might have to return since they are also the standard when there is *certainty* that he will have to reassume his lease. Moreover, the decision in the *Petty Motor* case sets this matter at rest, as Chief Judge Magruder points out (R. 41), since it denies admissibility of removal cost evidence even though there was, at the date of taking, a chance that the Government's occupancy might have been cut short. *Supra*, pp. 14, 17-18.

Respondent's only suggestion of a reason why the court should close its eyes to the true facts is its assertion (Br. in Opp., pp. 4-5) that otherwise it would be in a less favorable position than that occupied by a tenant whose case happened to be tried before the option exhausting the term was exercised. But that is surely no reason for allowing consideration of moving expenses when it is known, as here, that the tenant will not have to re-occupy the premises.[12] In *Sinclair Rfg. Co.* v. *Jenkins Co.*, *supra*, at 698, an action for breach of an agreement to assign a patent application, the Court pointed

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[12] The Government exercised the option which exhausted respondent's lease-term on May 25, 1944 (R. 15). The matter came up for trial in May 1947 (R. 25).

out that if the trial follows quickly after the issuance of the patent, there normally will be no actual experience with the patent to help determine its value, but if the trial does not come for some years, a different situation is presented and actual experience will be available and admissible in evidence. *Mutatis mutandis*, the same is true of the great mass of damage actions.

Moreover, although the question is not presented on the facts of the instant case, it seems clear that the assumption of respondent's argument is erroneous. If at the time the case would ordinarily come up for trial there is doubt whether the Government's occupancy will exceed the tenant's term, no reason appears why the trial could not normally be postponed until the facts were known, or at least the question of removal costs held in abeyance. As the majority opinion below itself suggests (R. 51), an apt analogy is found in the postponement of determination of damages-beyond-ordinary-wear-and-tear for which the Government may be liable until the Government's occupancy ceases, since such damages are not capable of determination in advance.[13] *Kimball Laundry Co.* v. *United States*, 338 U. S. 1; *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.);

[13] In the *General Motors* case it was noted (footnote 3, 323 U. S. at pp. 376-377) that the amended judgment reserved jurisdiction for this purpose.

In cases where the taking prescribes an option to renew, the condemnation proceeding must also, of course, be held open for determination of awards for the extended periods of Government occupancy. Cf. R. 8, 11-19.

United States v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257 (D. Md.); cf. *11,0000 Acres of Land in Smith County, Texas* v. *United States*, 152 F. 2d 566, 568, 570 (C.A. 5), certiorari denied, 328 U. S. 835. We know of no rule giving a party a right to have his claim tried before the facts vital to the disposition of that claim can be known.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed.

Respectfully submitted,

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